EXECUTIVE COMMISSIONS OF INQUIRY.

Some recent cases in Australia and New Zealand have brought into prominence the question of the power of the Executive Government to carry on investigations involving the examination of witnesses, with a view to some further action to be determined by the results of this investigation. The subject is not a new one to English lawyers and it has many interesting phases which are not always distinguished. It is historically connected with attacks on the liberty of the subject and, in so far as it threatens the province of courts of law, important questions arise touching the relations of the Executive and the Judiciary. These questions have a significance of their own where, as in the Commonwealth of Australia and the United States of America, the Executive and the Judicial powers are committed to distinct and exclusive organs. While in England and in countries under plenary Parliamentary Government, the authority of Parliament concludes the matter wherever it has plainly granted to the Executive an inquisitorial power, in the United States and in the Commonwealth the question may remain whether such a grant of power is consistent with the Constitution itself. In federal constitutions also, the question arises as to whether the subject matter of the inquiry is within the power of the Government from which the authority purports to proceed. These are all questions of law. But in countries like England and Australia, there are further questions of a "constitutional" kind in the special sense in which that term is used in relation to Cabinet Government; that is to say, there are questions apart altogether from legality, as to whether the devolution of certain kinds or methods of inquiry is consistent with the principle of the responsibility of the Cabinet to the House of Commons or other chamber to which it is conventionally responsible. Further, in considering the lawfulness of commissions, there are questions as to the implications of legality or illegality in this connection. If we say the inquiry is lawful, do we mean that recalcitrancy on the part of those to whom it is addressed is a crime; that evidence may be taken on oath; that false testimony is perjury; and that defamatory statements made in the course of such inquiries are privileged? If we say that these inquiries are unlawful, do we imply that those making the inquiry have committed some punishable offence, or that the commission or other

instrument may be annulled by appropriate process; or do we merely mean that the commission is without power of compulsion, and no more than an indifferent nullity. Some of the obscurity of the subject appears to belong to a want of precision in terms.

One of the first conditions of all success in action, whether on the part of governments or individuals, is accurate knowledge of the subject to be dealt with. How early this was appreciated in our history, and how deep it has cut in our institutions is seen in those Norman inquests which have given us on one side the jury, on the other the "great inquest of the nation," Parliament itself. The King desired to be informed; he caused his justices to make inquiry by sworn men. These jurors would make presentment to the justices of crimes and of other facts which the King desired to know, or which the country desired to bring before him. To this day the presentment of the grand jury may contain recommendations for the amendment of the law. In time the jurors themselves, whether acting as a grand jury of presentment or as a trial jury, have to receive testimony. With the appointment of the justices of the peace, the Crown has a new mode of inquiry concerning offences and offenders. These justices had statutory authority to inquire in case of offences, to apprehend offenders and to hold them or bail them for trial at Quarter Sessions or before the King's commissioners of gaol delivery and oyer and terminer. Later, during the conciliar government of the Tudors and the Stuarts, the vast increase of administrative and judicial duties of the justices of the peace, with the close connection between the justices and the Council (or its off-shoots) afforded another means whereby the central government could be informed of the state of the nation. Directly, the Council or the Star Chamber exercised powers of inquiry which in practice knew no limit save the discretion of the authority itself. However grievous may have been the intervention of the one or the other in matters cognizable in the common law courts or in private and domestic matters belonging preferably to the *forum domesticum,* no one probably doubted the power of the Council to inquire into matters affecting the government and State. From the *Countess of Shrewsbury's Case*[1] in 1612—a case in which Coke took part as Chief Justice of the Common Pleas—there was a "Select Council" (*i. e.* a Select Committee of Council) to inquire into the marriage of the Lady Arabella Stuart (a lady of

[1] 12 Co. Rep. 94.

the blood royal and near in the succession to the throne) with a son of the Earl of Hertford; and Lady Shrewsbury was charged with being privy to the affair and having assisted the flight of the parties. On her refusal to answer questions and sign a statement made by her, the judges resolved that she was guilty of a great and high contempt against the King, his Crown and dignity, and that if it should be permitted, it would be an occasion of many high and dangerous designs against the King and the realm which cannot be discovered, and that it was contrary to the oath of allegiance. It was also resolved that the Select Council could not fine or imprison, for that ought to be assessed judicially. Accordingly the Council merely expresses its opinion of the fit punishment which should be awarded judicially in the Star Chamber, and suggests a fine of £20,000 and imprisonment at the King's pleasure.[2] In the Star Chamber, it was adjudged that the question was one of State, and so this was an examination proper for the council-table, and that

"to deny to satisfy the King and State in a point wherein they are so nearly interested, is to deny a part of allegiance, which requires all duties that tend to the good and preservation of the State."

Investigations into matters of public concern were also made through commissioners. The *Rotuli Parliamenti* abound with requests by the Commons for inquiries into grievances and with references to commissioners.[3] The tendency under the Tudors was to increase these commissions.[4] The issue of commissions of inquiry in relation to the miscellaneous matters which came before it was a part of the regular procedure of the Star Chamber.[5] The most notable of the commissions under the Tudors were the Commissions of Inclosures of 1517, the commissions for the investigation of the monasteries, and the Court of High Commission for ecclesiastical causes. Of these, the last was set up under color of the Statute 1 Elizabeth, and the second drew statutory authority from the Act of 1533 for the Abolition of Peter's Pence.[6] The "Domesday of Inclosures" of 1517 is however an act of prerogative. Statutes had been passed in 1489 and 1515 to check the conversion of arable into pasture land and the depopu-

[2](1617) Hobart 235.

[3]See Index, *sub voc.* Commission, Commissioners, Inquiries.

[4]Percy's The Privy Council under the Tudors, 35, 36.

[5]Select Cases in Star Chamber (Selden Society) vol. 2, lxxvii *et passim.*

[6]§ 20.

lation of the country, under penalty to the Crown in case of evasion or breach. In 1517 the Crown by letters patent appointed commissioners for several counties of England, to inquire *per sacramentum proborum et legalium hominum* upon a large number of subjects specified in detail relating to the matter in question, and the sheriffs were commanded that on the day appointed by the commissioners they should cause to come before the commissioners *probos et legales homines* by whom the truth of the matters to be inquired into might be known. The results were to be certified into the Chancery by a day fixed.[7] A further commission was issued in 1518 to complete the work. The purpose of the inquiry is apparent by what follows. Following on the report of the first commissioners large numbers of persons were summoned to appear in the Chancery, and suits were begun against them in the Court of Exchequer for the recovery of the King's moiety under the Act of 1489.[8]

At the beginning of the nineteenth century, there is the notable case of the Princess of Wales (afterwards Queen Caroline, consort of George IV) as to whom in 1806 the Crown issued a commission to inquire into the allegations of misconduct made against her. The commission took evidence, and the witnesses were examined by Sir Samuel Romilly, the Attorney General. But it is as attendant on the comprehensive legislative schemes of a reformed Parliament that these inquiries begin to assume an importance which has eventually established them as an essential part of the machinery of modern government.

In 1832, a Royal Commission was appointed to inquire into the operation of the poor laws, and on its report was founded the great Poor Law Amendment Act of 1834. The Municipal Corporations Act 1835 was also preceded by the investigations and report of a Royal Commission. Between 1832 and 1844 no fewer than 150 Royal Commissions of Inquiry were at work,[9] and subsequent returns from time to time furnished to the House of Commons show that the practice has no tendency to diminish. It is of course connected with the fact that the development of the British Constitution has come to charge the Cabinet with the preparation of projects of legislation to be submitted to Parliament, and that the responsibility of the Cabinet to the House of Com-

[7] The Domesday of Inclosures, by I. S. Leadam, 81 *et seq.*

[8] *Id.*, 2 and 9.

[9] See 2 Redlich & Hirst, English Local Government, 320.

mons and still more to the country has come to rest at least as much upon its legislative policy as upon its efficiency in administration. To some extent the need for such special investigations is now diminished by the number, the powers and the efficiency of the departments of central governments. In some cases these departments are themselves, if not developments of commissions of inquiry, at least descended from them: commissions which have been made permanent by statute, and to which powers of administrative action have been given. As early as 1849, Toulmin Smith, in his attack upon "Government by Commission," as he described the novel system, distinguishes between administrative inquiries and commissions of inquiry. A power of inquiry is made incident to many of the functions of the Local Government Board, the Board of Education, the Board of Trade and several other departments of government. Thus, the Board of Trade directs an investigation in the case of railway accidents[10] and of shipping casualties,[11] *e. g.* the loss of the Titanic, and with other departments holds inquiries on applications for "provisional orders." On the other hand, the commissioners to inquire into corrupt practices at Parliamentary elections are a case in which permanent statutory provision is made for an investigation (with all incidental powers) as from time to time it may be called for by address from Parliament. The function of the commissioners is purely to investigate and report to the Crown, any further action being taken by the Executive or Parliament.[12] Finally, in Australia one of the latest acts of the Commonwealth Parliament[13] constitutes a permanent body which, in addition to its administrative and judicial functions, is charged with the duty of investigating from time to time all matters which in its opinion ought to be investigated affecting production of and trade in commodities, the encouragement and improvement of Australian industries, external trade, the tariff, prices, profits, wages and social and industrial conditions, labor, employment and unemployment, foreign bounties, population, immigration, and such other matters as may be referred for investigation. The commission has full power to send for persons and documents. It serves to call attention to the fact that inquiry and publicity are regarded as powerful weapons in

[10]Railway Regulation Act 1871.

[11]Merchant Shipping Act 1894.

[12]15 & 16 Vict., c. 57; 31 & 32 Vict., c. 125; 46 & 47 Vict., c. 51.

[13]The Interstate Commission Act 1912 (assented to December 24, 1912.)

coping with some of the most characteristic of modern social difficulties.

Though the use of Royal Commissions to obtain information for the foundation of legislation is the purpose most familiar in practice, they are also used in aid of executive action. Thus, Royal Commissions have been appointed to inquire into the causes of public disturbances, and the conduct of the magistrates and the police in connection therewith, as in the case of the Belfast Riots in 1865, the Dolly's Brae Commission in 1850, the Jamaica Commissions in 1865, and the Sheffield outrages in 1867.[14] Again, Royal Commissions are used to overhaul the Civil Service, from time to time, the Civil Service in England being regulated not by statute but by executive minutes. In addressing the Crown as to the exercise of the prerogative of mercy, the Home Secretary, the responsible Minister, has necessarily to inform himself of the relevant facts, and he sometimes does so by appointing a commission to inquire into the matter. This was done a few years ago in the case of Beck, which gave the impetus required to procure the establishment of the Court of Criminal Appeal. It was done at the close of 1912 in the case of an engine-driver in the service of the North Eastern Ry. Co. whose conviction by magistrates for drunkenness followed by his dismissal from his employment, led to a strike by a body of the company's servants. It is evident that in this class of case, we are getting on very delicate ground; but the whole power of the Executive to revise judicial sentences is one capable of perverted use, and the interposition of a public inquiry though with unsworn testimony, without the fear of a prosecution for perjury, and without rules of evidence, does not appear to increase the risks. In some parts of the Empire, as in New South Wales, statutory provision is made for such inquiries under proper safeguards by a judicial officer;[15] and in England, the Home Secretary may refer cases to the Court of Criminal Appeal, but without prejudice to any prerogative powers.[16] Finally, Royal Commissions have themselves been made the subject of an official investigation, for in 1910 the Home Secretary appointed a Departmental Committee to consider their work and procedure. The Committee made inquiries of a large number of persons who had served on such commissions, and its report contains interesting observations as to their sphere of use-

[14]See Clark's Australian Constitutional Law, Chapter XII.

[15]Criminal Law Amendment Act 1883, § 383 (N. S. W.)

[16]Criminal Appeal Act 1907, § 19.

fulness and suggestions as to the best course to be followed in such investigations, particularly with a view to diminishing their cost.[17]

The practice then of executive inquiry is well established; it remains to consider its legal and constitutional position. This was fiercely assailed in the middle of the nineteenth century, when these novel commissions were becoming frequent. In 1833 Sir James Scarlett (afterwards Lord Abinger) with Sir Wiliam Follett and Mr. Rennell gave an adverse opinion to the Merchant Tailors Company as to the powers of the Royal Commission on Municipal Corporations; in 1850 four very distinguished lawyers (G. J. Turner, R. Bethell, H. S. Keating and J. R. Kenyon) similarly advised the University of Oxford as to the illegality of the Oxford University Commissions; and in 1849 Toulmin Smith's volume against "Government by Commission" was published. In the cases of the University and the Municipal Corporations, the objectors fastened upon the fact that the law provided a means for the judicial determination of any abuses committed by them. Thus, Scarlett says:

"The known and lawful manner of inquiry into the misconduct of a corporation or the improper exercise of its franchises is by information in the Court of King's Bench, which can only be granted upon some specific charge or to redress some specific grievance."[18]

The University Commission is denounced as bringing into question out of the regular course of law the rights, property, franchises and conduct of the University and its members. The inquiry is thus an interference in the case of the University itself with that supervisory authority analogous to visitatorial power exercised over lay corporations by the Court of King's Bench; in the case of the Colleges of Oxford an interference with the jurisdiction of the Visitor over such colleges as ecclesiastical corporations.[19]

In both cases the attempt to commit to such commissions a power to compel the attendance of witnesses or the disclosure of facts is declared to be void, not merely on the ground that the commissioners are usurping the jurisdiction of legal tribunals, but on the broader ground that "the Crown cannot by its own authority compel persons to give information except in the regular

[17]Parliamentary Papers (Cd. 5235.)

[18]Annual Register 1833, p. 158.

[19]Sessional Papers 1852, vol. 26, 331 *et seq.*, 341 (Bethell & Kenyon.)

course of administering justice, the course of which the Crown cannot alter." The law officers of the Crown (Sir J. Dodson, Sir Alexander Cockburn and Sir W. Page Wood) gave a contrary opinion in which they deny the infringement of any jurisdiction, but admit that commissions to hear and inquire into offences without determining them are a course of proceeding unknown to and contrary to law.

For practical purposes, the "legality" of commissions of inquiry has depended upon their power to compel testimony, and modern practice appears tacitly to admit the broad proposition laid down by the counsel for the University of Oxford—that the Crown has no prerogative to compel testimony except in proceedings regularly taken in courts of justice, though the modern form of commission retains the power to summon witnesses and to send for papers.[20] In the case of departmental inquiries held under statutory authority, the statute which authorizes inquiry usually also authorizes the investigator to compel testimony.

The most significant admission of the defect of any power of compulsion is seen in the fact that in special cases where the power was to be given, it has been specially conferred by Act of Parliament. The Act of 1886 dealing with the case of the Belfast Riots recites the appointment of a Royal Commission to inquire into the disturbances and the action of the authorities, recites that powers for effectually conducting such inquiry cannot be conferred without the authority of Parliament, and then proceeds to authorize the Commission to enforce the attendance of witnesses and the production of documents. In other respects it assimilates the proceedings of the commission to a court of law —it may take evidence on oath, false evidence is made subject to the penalties of perjury, and power is given to punish for contempt. The famous "Parnell Commission" was appointed under a special Act of Parliament[21] to inquire into the truth of charges

[20]"And for the better effecting the purposes of this our Commission, we do by these presents give and grant unto you or any (three, five, varying with the number of the commissioners) or more of you full power to call before you such persons as you shall judge likely to afford you any information upon the subject of this our Commission; And also to call for, have access to, and examine all such books, documents, registers and records as may afford you the fullest information on the subject, and to inquire of and concerning the premises by all other lawful ways and means whatsoever; And we do by these presents authorize and empower you or any ( ) or more of you to visit and personally inspect such places as you may deem it expedient so to inspect for the more effectual carrying out of the purposes aforesaid." P. P. 1911 Cd. (5626) (5761) &c.

[21]The Special Commission Act 1888.

and allegations made against various members of Parliament during the trial of *O'Donnell* v. *Walter* and was vested with the full powers of the High Court or any judge thereof in civil actions. Practically, therefore, the question of any difference in law between commissions to inquire into offences or other matters cognizable in the courts of justice, and commissions appointed to inquire into matters of public interest not directly cognizable in courts has not been brought to the test, though the distinction is well recognized as a matter of constitutional propriety.[22] One of the strongest objections to the Parnell Commission was that it mixed up two things—charges against individuals that were proper for judicial determination only, and the consideration of a general political movement extending over a number of years, which was not a proper subject of judicial determinations at all.[23]

In Australasia the place of Royal Commissions of Inquiry as part of the regular machinery of government is marked by the fact that in each of the States, there is a statute which permits such commission to compel the attendance of witnesses and the production of documents, to examine under oath or affirmation, imposes penalties for recalcitrancy, and gives the same protection to commissioners and witnesses as they would enjoy respectively as judges and witnesses in civil proceedings before the courts.[24] The Commonwealth in its first session passed an act of a similar kind[25] and in 1912 this was amended by a very drastic act[26]

[22]See Hansard's Parliamentary Debates 1865, vol. 177, 401 (Sir George Gray).

[23]Hansard, vol. 330, 278 (Lord Herschell). It should be added that there was another reason for the existence of certain Parliamentary commissions in the Statute book—they were inquiries which Parliament forced upon an unwilling King. Of such a kind was the Commission of Public Accounts in 1666 (Hallam, II, 356-7). The House of Commons has, of course, others means, through the responsibility of the Cabinet, of compelling inquiries in modern times, and it can, of course, institute its own inquiries by committees.

[24]New South Wales: 1901, No. 23, embodying 44 Vict., No. 1.
This Act is based upon 34 Vict., No. 1, which received the Royal Assent on September 3rd, 1870, and expired on Dec. 1st, 1870. The production of documents except in the case of persons in the public service was not made compulsory until 44 Vict.
Queensland: The Official Inquiries Evidence Act 1910 (1 Geo. V, No. 26.)
South Australia: The Witnesses in Commissions Oaths Act 1873 (No. 20.)
Tasmania: 52 Vict., No. 26.
Western Australia: Royal Commissioners' Powers Act 1902 (1 & 2 Ed. VII. No. 28.)
Victoria: Commissions of Inquiry Act 1910 (No. 2249.)
New Zealand: Commissions of Inquiry Act. 1908.

[25]Royal Commissions Act 1902.

[26]Royal Commissions Act 1912.

under which any defect in the prerogative is supplied by a statutory power to the Crown to appoint commissions to inquire and report upon any matter relating to or connected with the peace, order and good government of the Commonwealth, or any public purpose or power of the Comonwealth;[27] the compulsion to produce documents is no longer limited to what is "material to the subject matter of the inquiry;" it extends to all which the witness is required to produce, but the witness is to be allowed in a prosecution to show that the documents in question were not relevant to the inquiry; refusal to attend or answer questions is subject to a penalty of £500, and if persisted in, by further penalties of £500 for every day on which the offence is committed; a second conviction in the case of the same commission involves a minimum penalty of £500 with a maximum of £1000 and imprisonment. All persons summoned to attend a commission are bound to continue their attendance from day to day until released, and if absent may be apprehended by warrant of the president or chairman. There are various provisions for the protection of the commission and its proceedings—false testimony or bribery of witnesses is an indictable offence punishable with five years imprisonment; to mislead an intending witness with a view to affecting his testimony, and to destroy books or documents knowing that they may be required by a commission, are punishable with two years imprisonment; to do any act preventing a witness from attending or giving evidence involves a year's imprisonment; to cause any injury or loss to a witness for having given evidence or to dismiss or prejudice any employee on account of any evidence given by him involves a penalty of £500 or a year's imprisonment—in the last case the burden is thrown on the employer of showing that an employee dismissed or prejudiced was so dismissed or prejudiced for some other reason. Finally, insult, interruption, defamation, or any wilful contempt of a commission is an offence punishable by fine of £100 or three months' imprisonment; and if the president of a commission is a judge he has the power of a Justice of the High Court to deal with all contempts committed in the face of the commission. The principle of the Act is first to substitute the widest discretion in the executive government and in the commission for the limited powers under the earlier law in order to avoid the interruption of inquiries by long drawn out legal proceedings to test the extent of the commission's powers; secondly, to sanction the law by penalties of so severe a kind as to deter

[27] *Id.*, § 3.

even wealthy interests from opposing the course of inquiries. No doubt the powers are liable to abuse, and the severity of the penalties is calculated to deter people from taking risks even where the law is probably being exceeded; and commissioners may think that any strong criticism is wilful contempt. But the rights of legal objection were also liable to abuse; ingenious minds and ample powers together could furnish a series of interruptions which would suspend indefinitely the course of the inquiry. The Act is one of the many modern indications of the belief that a government resting upon responsibility to the people is a better interpreter of "social justice" than are the courts of law.

In view of the powers given by statute in Australasia, it seems curious that it is New Zealand and Australian courts which have had to consider the whole question of the power of the Crown to issue commissions of inquiry. The explanation is that such statutes deal merely with the power of compulsion and are silent on the subject of the power to issue the commission or undertake the inquiry.[28] Hence the view has been taken in two courts that if there are at common law limits to a prerogative power of inquiry, those limits remain and the new power of compulsion operates only in those cases to which the prerogative of inquiry extends.[29] In *Clough* v. *Leahy,* the Government of New South Wales (who may be assumed to be exercising such powers as are possessed by the Crown) had issued a Royal Commission to inquire into the formation, constitution and working of a particular industrial union, to consider whether it was an evasion of two acts of the Parliament of New South Wales, whether it hampered the Industrial Arbitration Court in doing justice in disputes arising in the pastoral industry, and whether any alteration of the law was necessary in this connection. A witness was prosecuted for refusing to give evidence, and a prohibition was sought from the Supreme Court to the court in which the prosecution was taken. The aspect in which the facts of the case appeared to the court may be seen from the following passage:—

"A thrice-defeated litigant first obtaining a select committee of the Legislative Assembly, of which committee he is the chairman, to enquire into the subject-matter of the litigation, followed by the appointment of a Royal Commission, of which at first he is made

[28]The Commonwealth Royal Commissions Act 1912 seeks to avoid this by expressly giving to the Crown a very wide power of inquiry; in doing so, it may have escaped from Scylla to Charybdis, for it may have given powers beyond those committed by the Constitution to the Commonwealth.

[29]New South Wales—Clough *v.* Leahy (1904) 4 S. R. (N. S. W.) 401; New Zealand—Cock *v.* Attorney-General, 28 N. Z. L. R. 405.

president and the members he had selected for the Select Committee of the House made members. Common decency at last prevailed, and led to the alteration of this, and after having been made a member of the Royal Commission, he is finally excluded, his nominees, however, remaining as members, a District Court Judge being nominated president."[30]

The Court unanimously determined that the Commission was one to inquire into and report upon a matter entirely within the jurisdiction of the Arbitration Court.

"The true object of any Royal Commission is to cause enquiry into questions of public interest and for the public good, but no Royal Commission should be advised by Ministers, or can be legal which has for its object an enquiry into private matters or the subject of litigation between private parties and in which the public have no interest."[31]

The Commission in the present instance was both illegal and unconstitutional as an unjustifiable attempt to invade private interests and an usurpation of the jurisdiction of a court (*i. e.* the Court of Industrial Arbitration) lawfully constituted to deal with the same matter.[32]

In *Cock* v. *Attorney General for New Zealand*[33] the commission was one to inquire into certain allegations of bribery in connection with the grant of certain licenses and of the necessity for legislation. The court held that there must be some limit to the Crown's power of inquiry, and this defined the power of compulsion given by the Commissioners of Inquiry Act 1908. The limitations and their extent were demonstrated by legislation, by 42 Edward III, c. 3 and the Act for the Abolition of the Star Chamber, 16 Car. I, c. 10, as well as by the resolution of the judges in the case of Commissions of Inquiry *temp.* James I. In the present case the inquiry was as to whether certain offences against the law had been committed, and as to that the Crown's power of inquiry was limited to proceedings regularly undertaken in a court of law.

In the controversy as to commissions of inquiry from the time of Coke onwards various statutes have been adduced as establishing their illegality.[34]

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[30] 4 S. R. (N. S. W.) 401, 415.

[31] *Id.*, 414-15.

[32] *Id.*, 417

[33] 28 N. Z. L. R. 405.

[34] *E. g.*, Bacon's Works (11th ed.) 350, (Whitelocke); Sess. Papers 1852 (26th ed.) 331 *et seq;* Cock *v.* Attorney-General for New Zealand, 28 N. Z. L. R. 405.

Magna Carta c. 29 *"Nullus liber homo capiatur,"* etc. is invoked by Whitelocke[35] against commissions of inquiry. Elsewhere, it is the Statutes of Edward III supplementing the provisions of the Great Charter which have been most in evidence.

18 Ed. III, Stat. 2, c. 1, declares that commissions of new inquiries shall cease and be annulled, saving indictments for various matters specified, and chapter 4 of the same Parliament provides that the commissions to assay weights and measures shall be repealed and none such be granted henceforth. In both cases the commissions appear to have contained remedial or punitive powers.[36]

34 Ed. III, c. 1. declared that

"all general inquiries before this time granted within any seignories, for the mischiefs and oppressions which have been done to the people by such inquiries shall cease utterly and be repealed."

The statute is still in force, and the Consolidated Index of Statutes purports to state its effect in the terms "general commission of inquiry abolished." But the significance of the provision is diminished when we regard the other contents of the Act and the events which preceded it. The Act is that which provides for separate commissions of the peace for each county, with judicial powers and power to arrest and hold to bail offenders. It follows some experiments in machinery for the preservation of the peace, and particularly the establishment of a general commission whose operations seem to have been found vexatious, and which is now abandoned in favor of commissions of local gentry for the separate counties.[37] In either case the commission is doing more than inquire; its inquiries are followed by some act of authority.

In 42 Ed. III there are two statutes which may be referred to. Chapter 3 is that which declares that none shall be put to answer an accusation made to the King without presentment or matter of record or by due process and writ original. This is treated by the Supreme Court of New Zealand as a statutory prohibition of commissions of inquiry as to offences committed; and is also relied on by the counsel for the University of Oxford. At the most, it could be construed to prohibit the examination of persons concerning crimes committed by them. In fact it is dealing with the

[35] *Infra*, p. 516.

[36] *Cf. Rotuli Parliamenti* (18th ed.) vol. 2, 148a, which recites the oppression of the "Syres Fraunceons" in the first case; and in the case of weights and measures, *Rot. Parl.* vol. 2, 149b.

[37] See Beard, Office of Justice of the Peace, 38-41.

attempt to draw offences for trial into authorized tribunals, just as 25 Ed. III, Stat. 5, c. 4, protects a man from having to answer concerning his free tenement, and as other statutes before and after make ineffectual attempts to check the criminal jurisdictions of the King's Council.[38]

More to the point appears to be the Statute 42 Ed. III, c. 4. It recites that commissions have been granted in divers counties at the procurement of certain persons, which commissions have made their inquiries in secret places and by people not sufficient and of their covin, more to their private profit than to the King's advantage or that of his people; wherefore it is established that in all inquiries within the realm the commission shall be made to justices of either of the benches or of assize or to justices of the peace with others of the most worthy of the country, as well for the King's profit as the commons, saving the office of escheator or anything that touches the same office. The grievance here dealt with seems to be of the same class as that which leads 2 Ed. III, c. 2 to prohibit oyers and terminers except before the justices of either bench or the justices errant.[39]

It should be remembered in connection with this Act that there is a long history of opposition to the frequency of commissions in eyre and to the grant of commissions to unfit persons to inquire of matters touching the multifarious rights and profits of the King. In 50 Ed. III, the commissioners are again complaining, this time that matters belonging to the office of escheator are made the subject of inquiry by commissions constituted of persons of ill-fame, who by their false returns are harrassing the subject. The King's answer is that the commissions complained of shall be repealed and that henceforth none shall be issued save to justices, sergeants, or others learned in the law and to people sufficient and of good fame.[40] There are further complaints arising out of commissions in the reign of Henry IV—the results of the inquiries being returned into Chancery,—delays are taking place, traverses are not being admitted, and grants of lands and goods based on such returns are being made to the detriment of the sub-

[38]See Stephen's History of the Criminal Law, 169-170.

[39]Sess. Papers 1852, 332, n. 26. See Stephen's History of the Criminal Law, 107-110.

[40]2 *Rot. Parl.*, 331b. It is this incident which appears to be referred to in the marginal note in 4 Coke Inst., 163,—"for commissions of inquiry what persons ought to be named: so note a diversity between commissions of inquiry and of oier and terminer." The reference to *Rot. Parl.* 50 Ed. III, No. 51 is erroneous.

ject; and it is prayed that none shall be commissioners except Justices of Assize unless they have good estates in the county. The King's only response is that the common law shall hold.[41] In the same year and in 6 Hen. IV the grievances of commissioners themselves are under consideration, for various commissioners to inquire, hear and determine and commissioners to inquire and certify are being proceeded against and punished for neglect of commissions which they have never received,[42] and a statute is made in their favor.[43]

Coke's writings abound in denunciations of novel commissions and new inquiries.[44] But the commissions spoken of are in general undoubtedly constituting new courts, and obnoxious as affecting to determine offences and rights in unlawful tribunals, and, as incident to such judicial functions, to exercise the auxiliary power of courts. The case of *Skrogges* v. *Coleshil*[45] is an illustration. There a commission appointed to consider rival claims to an office in the Common Bench committed a recalcitrant party for refusing to appear, and the court released him on habeas corpus. So the cases cited by the counsel for the University of Oxford from the *Rotuli Parliamenti* are all cases in which the commissioners have done more than inquire. Those in 15 Ed. III, No. 14, have seized lands and imposed heavy fines; in 18 Ed. III, No. 3, there has been an abuse of array and purveyance; in 2 Hen. IV, No. 22, a commission of "barges and balingeres" appears to be a levy of some sort of ship money; while 5 Hen. IV, No. 39, is an irregular assumption of jurisdiction by the court of the constable and marshal which is holding a man in prison contrary to law.

The only case which appears to go further is the *Case of Commission of Inquiry*.[46] We are told that a commission had been issued to inquire of the depopulation of houses, the converting of arable lands into pasture, etc., but so that the commissioners

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[41] 4 Hen. IV, No. 67—3 *Rot. Parl.*, 503a.

[42] 3 *Rot. Parl.*, 498a and 555a.

[43] 7 Hen. IV, c. 11. An earlier statute had been made on the same subject.

[44] 4 Inst., 163, 245, 324; 3 Inst., 165; 2 Inst., 478. It may be mentioned that some at any rate of the "new inquiries" complained of in the *Rotuli Parliamenti* are merely inquiries made anew—we find in 5 Richard II, No. 83 (3 *Rot. Parl.*, 116a) a prayer that collectors, assessors and controllers of revenue shall be charged only on the rolls made between the collectors and their controllers without any other charge put upon them by reason of new inquiries made by persons subsequently appointed.

[45] (1559) 2 Dyer 175a.

[46] (1603) 12 Co. Rep. 31.

were to have no power to hear and determine the said offences but only to inquire of them; and that the commissioners took many presentments and returned them into Chancery; that it was resolved by the two chief justices and seven justices that the commissions were against law for four reasons, of which one is that the commission "is only to enquire, which is against law, for by this a man may be unjustly accused by perjury, and he shall not have any remedy." There are some unsatisfactory features about the report. It is in the 12th part of the Reports; how long after the event it was recorded we do not know—the case is attributed to Trinity Term 5 James I, and the 12th part of the Reports was published in 1656. On what occasion the resolution of the justices was made, whether judicially or not, does not appear. There are also certain absurdities and contradictions which can only be got rid of by an emendation of the text. It is stated that such a commission "may be only to enquire of treason, felony committed, etc. And no such commission ever was seen to enquire only, (*i. e.* of crimes)." It has been suggested to make this consistent with itself, that the words "treason and felony" are a transcriber's erroneous reading of the abbreviations which really stand for "treasure trove" and "felons' goods."[47] The law according to Coke would then stand that while novel commissions to hear and determine offences otherwise than in their proper courts were unlawful, and could be met by prohibition, commissions *to inquire only* of crimes were also unlawful. It is curious to observe that the commission here objected to was for the same purpose as the notable Commission for Inclosures of 1517 already referred to, which seems to have passed without censure even in the careful raking up of grievances which furnished materials for the articles of impeachment against Wolsey. Much no doubt might be possible to Henry VIII that was not possible to James I; but in view of Coke's statement that "no such commission ever was seen to enquire only of crimes," it does not strengthen our faith in the case.[48]

A few years later than that to which the *Case of Commissions of Inquiry* is attributed, we find Coke assisting in the Star Chamber in the proceedings against Whitelocke for contempt.[49] The

[47]See 12 Co. Rep. 31, n.

[48]In addition to the *Commissio ad quod damnum*, there are several writs of inquisition set out in the Register of Original Writs. See *sub. voc.* "Inquisitiones."

[49](1613) 2 How. State Trials, 765; Bacon's Works, vol. 11, 345 *et seq;* Whitelocke's *Liber Famelicus*, Appendix.

contempt alleged lay in an opinion given by Whitelocke as counsel to Sir Robert Mansel, Treasurer of the Navy, against the legality of a Royal Commission to inquire into abuses in the Navy, to give order for the due punishment of offenders, and to lay down rules and order for the better government of the Navy in the future.

We have not the terms of the commission, nor have we Whitelocke's opinion, but the official minute probably gives an accurate if not quite sufficient account of the matter. Whitelocke was plainly of opinion that the commission was irregular and without precedent—it was inquisitorial, and it infringed the various provisions of the law which require that men shall not be proceeded against except by process of law—"indictment, arraignment or trial, or by legal proceedings in his (the King's) ordinary courts of justice."

How much of this condemnation depended on Whitelocke's interpretation of the commission as one authorizing the commission to punish offenders according to their discretion, we do not learn. That interpretation is rejected by Bacon who as Attorney General appeared for the prosecution, pointing out that the scope of the commission was *ad inquirendum* merely, and the commissioners were to give order that offenders should be proceeded against in the ordinary course of justice. The counsel for the King urged that the inquiry was but a preparation for a subsequent proceeding at law, and no more forbidden by the statutes requiring indictment than were commitments by justices for trial, or the apprehension and detention of offenders before trial. It was also pointed out that in respect to the Navy, maintained by the King himself, his "regal" power was supplemented by a "dominical" power, as owner or master. Finally, there is the argument that as the matter is one of state and government, its legality is covered by the prerogative and absolute power incident to the King's sovereignty. In the end Whitelocke and Mansel make their submission, and the court, after the members had severally expressed their opinions of the grievous and dangerous character of their fault, recommended them to the King's clemency.

The case may suggest that in Whitelocke's opinion a commission to inquire only of offences is invalid, or his opinion may depend on his interpretation of it as establishing a court for punishment. Bacon is clear that a commission to inquire into matters touching the estate and government of the realm, even though it in-

volves an inquiry into offences that may have been committed is not an usurpation of the functions of courts or a violation of the rights of subjects; and the court's decision, concurred in by Coke, must go as far as this. Bacon, it should be noted distinguishes expressly between the "king's grants and ordinary commissions of justice" on the one hand, which may be frequently disputed in courts of justice, and "the King's high commissions of regiment, or mixed with causes of state," which are not to be so profanely handled.[50]

Four later statutory provisions have been considered material in dealing with this subject. The Petition of Right[51] recites the grant of commissions of martial law for various common law offences, which commissions, and all others of a like nature, are declared to be wholly contrary to the laws and statutes of the realm; and the Act in its operative part, having formally declared the commissions to be made, enacts that no commissions of like nature shall be issued. The mischief disclosed is two-fold—the submission of accused persons to an unlawful tribunal, and the claim of exempting from lawful courts based on the existence of such commissions. It is only by a very "equitable" interpretation that this can be extended to commissions of inquiry. Bacon, in Whitelocke's case, certainly does connect commissions of inquiry and commissions of martial laws as part of the King's absolute prerogative, but this is partly because of the subject matter—the commission there being to inquire into the state of the Navy—and partly because he is arguing that not merely are the commissions lawful, but that they belong to those matters of state as to which the ordinary courts may not inquire in any particular instance whether they are lawful or not.[52]

The Act for the Abolition of the Star Chamber[53] besides extinguishing various obnoxious courts, declares[54] that no court, council or place of judicature shall be erected which shall exercise the same or the like jurisdiction as the Star-Chamber, and[55] that neither the King nor the Council shall have any jurisdiction to examine, or draw in question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this

[50] 2 How. State Trials at p. 768.
[51] 3 Car. I, c. 1.
[52] See Moore, Act of State in English Law, 9.
[53] 16 Car. I, c. 10.
[54] § 4
[55] § 5.

kingdom, but that the same ought to be tried and determined in the ordinary courts of justice and by the ordinary course of the law.

As to the effect of this Statute, it is to be noted that it applies at least as extensively to acts of the Council as to acts of the King. Now, the Council, while thus excluded from civil and criminal jurisdiction, has exercised without check the power of investigating alleged offences affecting government and of committing offenders for trial—it did so in the reign of Charles II (*e. g.* in the case of Titus Oates' accusations) and it did so, though rarely, in the reign of Victoria (*e. g.* the case of Oxford who shot at the Queen in 1840).[56]

The Act for the Abolition of the Court of High Commission[57] cited by the counsel for the University of Oxford derives its only significance from the fact that the colleges of Oxford (but not the University) are ecclesiastical corporations, and the matter therefore might be considered as within the mischief of the Statute. The Act abolished the Court and repealed the statute of Elizabeth upon which it claimed to be founded, and forbade any person exercising spiritual or ecclesiastical power under the King's commission or authority to impose any penalty or tender any oath.

The Bill of Rights 1689[58] relates specifically to the "commission under the great seal for erecting a court called, The court of commissioners for ecclesiastical causes." The Act recites the issuing and causing to be executed such commission among the means whereby King James had endeavored to subvert and extirpate the Protestant religion and the laws and liberties of the King, and proceeds to declare that the commission and all other commissions and courts of like nature are illegal and pernicious. Now the commission denounced was one not only to inquire into but also to correct and punish offences; it was limited to offences or other abuses under the ecclesiastical law.[59] The terms of the Act cannot be extended to commissions to inquire only, and to inquire of matters outside the ecclesiastical law.

In the debates on the validity of commissions of inquiry, it is material to consider what is validity or invalidity in this connection. "Commissions," we are told, "are a delegation by war-

[56]See 1 Blackstone Comm., 230; 1 Stephen's History of the Criminal Law, 183.

[57]17 Car. I, c. 11.

[58]1 Will. & Mary, Sess. 2, c. 2.

[59]See the commission set out in 2 How. State Trials, 1143 *et seq.*

rant of an Act of Parliament or of the common law whereby jurisdiction, power, or authority is conferred to others." Seeing how close is the form (*ad inquirendum*) to that of the commissions of *oyer and terminer* (*inquirendum, audiendum, terminandum*) it may be inferred that they purported to confer a power to require information under some penalty, and to require that information on oath. As we have seen, the Commission for Inclosures in 1517 expressly refers to the oaths of the informants; and the Petition of Right, condemning the commissions for loans, condemns also the administration of oaths by such commissions "not warrantable by the laws or statutes of this realm." Coke, declaring that no oaths are to be administered save as common law or statute permits,[60] refers to a determination in the Parliament of 43 Elizabeth that for that reason certain commissioners in respect to policies of assurance could not examine on oath, and therefore power was given to them by statute. Also, commissioners administering any oath without lawful authority are guilty of a high contempt and are liable to fine and imprisonment. If the commission was proceeding to hear and determine, or themselves to fine and imprison for recalcitrancy, it might be met by the writ of prohibition, of which there are of course many instances—the commissioners are usurping the jurisdiction of a court.[61] Also, so far as a commission was unauthorized by law, the writ of *scire facias* would appear to have been an appropriate remedy to procure the recall of the letters patent. Bacon, in *Whitelocke's Case*, suggests that, if the commission were deemed objectionable, the proper course to take was to make a humble representation to the Crown; but in Bacon's view, of course, not merely was the commission lawful, but the very question of its legality was matter of State, not justiciable in the ordinary courts of justice. In the case of the Municipal Corporations Commission and the University Commission, no recourse to law was advised by the eminent counsel consulted. Sir Richard Bethell and Mr. Kenyon drew a petition which was presented to the Crown, praying for the recall of the University Commission as in derogation of the rights of the petitioners and of the jurisdiction of Her Majesty's courts of justice. The prayer was not granted.[62]

In modern times no attempt has been made to take evidence on

[60] 3 Inst., 165.

[61] 4 Coke Inst., 245; The Case of Isabel Peel (1628) Cro. Car. 113; Drake's Case (1631) Cro. Car. 220.

[62] Sessional Papers 1852 (26th ed.) 341.

oath except under the authority of an Act of Parliament; and the modern commission, save where the like authority exists, avoids the appearance of compulsion.[63]

The conclusion submitted from the foregoing inquiry is that there is no rule of law which attaches illegality in any definite sense to the mere issue of a commission of inquiry by the Crown, or to the act of investigation in pursuance of such a commission. The distinction between public matters of lawful inquiry and private matters which are not to be inquired of—the distinction drawn by Bacon and used in the later condemnation of commissions—seems really material only as founding a claim in the former case to exercise powers of compulsion which, as common law powers, are now abandoned and may be treated as obsolete. The general principle contended for by Bacon, of a fundamental distinction in law between matters of state and government, the *jus publicum,* on the one hand, and matters of *meum* and *tuum,* the *jus privatum,* on the other, is one which the English system rejected. What is matter of state and government, what is public or private, what concerns the welfare of the community and what the rights of individuals varies from age to age. It has its place in the sphere of political wisdom or of constitutional propriety. It is essentially a political question and one which should not lightly be put in legal fetters. It is submitted at any rate that it does not constitute a rule of common law governing the construction of statutes expressed in general terms.

This is the conclusion which was arrived at by the High Court of Australia on appeal in the case of *Clough* v. *Leahy.*[64] There is no rule of law which prohibits inquiries to private persons and no rule of law which makes an exception in the case of the Executive Government, even though the matter inquired of be of a private nature, or be of some matter of offence or right capable of being brought to adjudication. There being thus at common law no limitation on the Executive in this particular, the suggestion that the power of compulsion given by the statute in general terms must be limited to such matters as were competent for inquiry at common law, was meaningless; and the court could not read into the statute anything which would justify a limitation of its terms upon any other ground.

[63]It may be taken that the terms of 14 and 15 Vict., c. 99, § 16, whereby commissioners and all other persons having by law authority to receive evidence are empowered to administer an oath applies to commissioners and others in judicial procedings and does not extend to Royal Commissions of Inquiry.

[64](1904) 2 C. L. R. 139.

It should be observed that in this case the High Court of Australia was dealing with a New South Wales statute, and the Parliament of New South Wales is endowed with plenary legislative power, subject to certain matters now excepted from it by the Constitution of the Commonwealth. Further the allocation of legislative and judicial power to distinct organs is not made with the same emphatic declaration as in the United States, though it is probable that it is made with sufficient clearness to bind the Legislature until the Legislature has altered the Constitution by some express act.[65] In the case of the Commonwealth Government, the powers of the Commonwealth Parliament are like those of Congress granted by enumeration of particular subjects, and the legislative and judicial powers are separated in the same clear and emphatic way.

The Australian Industries Act 1906-7 of the Commonwealth Parliament is one of the same class as the United States Interstate Commerce Act, on which indeed it is in some particulars based—it is aimed at trusts and monopolies and at the "dumping" of foreign goods on the Australian market in destruction of Australian industries. Amongst the iniquisitorial powers given is one by which the Comptroller-General of Customs if he believes or if he is informed in writing that an offence has been committed under the Act, may interrogate any person in relation thereto and may call for the production of any documents for his inspection.[66] It was objected, in a prosecution for refusing to give information as required,[67] that the provision was *ultra vires,* in that the section practically established discovery in aid of criminal proceedings, and that such discovery was a part of the judicial power. The High Court rejected the contention, holding that the power of inquiry was not itself judicial power; that preliminary inquiries in relation to criminal offences were well known in the law and were recognized as not judicial, even when conducted by justices of the peace;[68] and that the provisions in question were *intra vires* as equipping that portion of the Executive which administered the

[65]Cooper *v.* Commissioner of Income Tax for Queensland (1007) 4 C. L. R. 1304.

[66]Australian Industries Preservation Act 1908-9 (Vict. 8 of C'wealth Statute) § 15b.

[67]Huddart, Parker & Co. *v.* Moorehead (1909) 8 C. L. R. 330. In the course of this case reference was made to several decisions of the Supreme Court of the United States, notably Kilbourn *v.* Thompson (1880) 103 U. S. 168; Interstate Commerce Commission *v.* Brimson (1894) 154 U. S. 447; Boyd *v.* U. S. (1886) 116 U. S. 616; Hale *v.* Henkel (1906) 201 U. S. 43.

[68]Cox *v.* Coleridge (1820) 1 B. & C. 50.

Act with powers of effective inquiry, powers particularly apt in the case of an act of this kind, and no more than was familiar in various acts in aid of administration, *e. g.* Customs, Audit, Census, Immigration Restriction. The Court was of opinion however that when once a judicial proceeding was instituted under the Act, the application of the section in relation to the offence charged would be an interference with the judicial power;[69] and in the later case of *Melbourne S.S. Co.* v. *Moorehead*[70] the Court held in accordance with this opinion, that the section must be construed as inapplicable where a proceeding was actually pending. Isaacs, J. however did not consider that the procedure authorized could in any event be an invasion of the judicial power,[71] and only concurred in the judgment on other grounds.

Two other questions as to the power of inquiry have arisen in the Commonwealth. In *Huddart, Parker & Co.* v. *Moorehead*[72] it was assumed that the power of compulsory inquiry in the Commonwealth Government or Parliament must be incident to some power of the Commonwealth Executive or Legislature, and that it could not extend to matters which were not in the executive or legislative power of the Commonwealth. This was established and applied in the *Colonial Sugar Refining Co.* v. *Attorney-General*[73] and an injunction was granted as to inquiries on subjects within the exclusive power of the States Governments. Isaacs and Higgins, JJ., dissented on the very important ground that in determining the extent of incidental powers of the Commonwealth regard must be had not merely to the present executive and legislative powers, but to the fact that the Senate and the House of Representatives have the initiative power in constitutional amendment, and as by amendment any matter whatsoever may be embodied in the Constitution, the Commonwealth has a present power of inquiry wholly unlimited by subject matter. The majority of the court pointed out that this view proved too much—it could not be limited to the power of inquiry, and applies to the whole range of incidental power;[74] it would enable the Commonwealth to make laws on "matters incidental to anything," thereby destroying the federal basis of the Constitution.

[69]See Huddart, Parker & Co. *v.* Moorehead (1909) 8 C. L. R. 330, 379-80.

[70](1912) 18 Argus L. R. 533. Not yet reported in Commonwealth Law Reports.

[71]*Id.*, 539.

[72](1909) 8 C. L. R. 330.

[73](1912) 18 Argus L. R. 429.

[74]Sess. 51, Art. XXXIX of the Constitution (1900).

The same case deals with the means by which such inquiries, when *ultra vires,* may be met. One obvious means of course is by defence on a prosecution for refusing to answer questions. On the modern scale of penalties, however, this involves a serious risk for witnesses. It may also, as Australian experience shows, offer facilities for delay. In the case before the court, proceedings were taken by persons who had received summonses to attend as witnesses, with lists of questions intended to be asked them, for an injunction and a declaration. This the court, by a majority, held to be a proper course, and an interim injunction was granted. It will be noted as to the use of the declaration that the case follows *Dyson* v. *Attorney-General,*[75] and the two cases together are significant of the importance which this modern procedure is likely to play as a means of challenging governmental action and of bringing questions of power to speedy determination in courts of law.

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[75]L. R. [1911] 1 K. B. 410, L. R. [1912] 1 Ch. 158.